

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

DOCKET FILE COPY ORIGINAL

In the Matter of

JAMES A. KAY, JR.

Licensee of 152 Part 90 Stations in the
Los Angeles, California Area

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To: Honorable Richard L. Sippel
Administrative Law Judge

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

WIRELESS TELECOMMUNICATIONS BUREAU'S
TRIAL BRIEF

1. The Chief, Wireless Telecommunications Bureau, by his attorneys, and pursuant to the Presiding Judge's Order, FCC 98M-40 (released April 2, 1998), now submits its Trial Brief.

I. OPENING STATEMENT

2. Although this case is factually complicated, the basic story behind this case is simple. The Bureau commenced an investigation of Kay because it received complaints alleging that he was not complying with various provisions of the Communications Act and the Commission's Rules. Kay was directed to provide certain information as part of the Commission's investigation. Notwithstanding that directive, Kay refused to provide that information. Even after the proceeding was designated for hearing, Kay consistently refused to provide the information. After the proceeding was designated for hearing, Kay made it as

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difficult as possible for the Bureau and the Presiding Judge to obtain information concerning Kay's system. Once the Bureau was finally able to obtain information concerning Kay's operations, it became clear that Kay had engaged in extremely serious misconduct. Specifically, the record in this proceeding will show that Kay misrepresented his loading to the Commission on numerous occasions. The record will also show that on several occasions, Kay caused applications to be filed in the name of other individuals to avoid limitations on filing of applications for additional channels. The record will also show that Kay failed to construct certain stations within the time required by the Commission's Rules or permanently discontinued operations of those stations, thus resulting in cancellation of the license. The record will also show that in at least two cases, Kay willfully and maliciously interfered with radio communications. Finally, the record will show that Kay misrepresented facts and lacked candor to the Presiding Judge in this proceeding concerning his relationship with Marc Sobel (Sobel).

3. With respect to the Section 308(b) issue, the record will show that the Bureau sent a letter of inquiry to Kay pursuant to the Commission's authority under Section 308(b) of the Communications Act of 1934, as amended. That letter required Kay to provide certain information to the Commission in order to determine whether Kay violated the Communications Act or the Commission's Rules. Notwithstanding that request, Kay refused to provide that information. After Kay raised concerns about confidentiality, the Bureau specifically informed Kay that it had "no intention of disclosing Mr. Kay's proprietary business information, such as customer lists, except to the extent we would be required by law

to do so." Notwithstanding that specific reassurance, and the Commission's offer to narrow its request for loading information to "any date subsequent to January 1, 1994 convenient to Mr. Kay", Kay continued to refuse to provide the required information.

4. The representations Kay made in attempting to explain his conduct, both before and after designation for hearing, have been false in material respects. In his June 30, 1994 response to the Commission, Kay represented "that there is no date subsequent to January 1, 1994 for which the submission of the requested information would be convenient." In fact, Kay could have easily complied with the request by copying a small number of files off his computer system on to a floppy disk, providing a basic explanation of the information on the disks, and submitting that information to the Commission. Moreover, while Kay represented to the Presiding Judge and the Bureau that "[h]istorical loading records do not exist in any form . . ." and "[n]o archive of old or previous information was ever created," Kay's office regularly created back up tapes containing prior loading information in the form of computer files. Notwithstanding Kay's knowledge that the Bureau was interested in loading information, Kay continuously destroyed or overwrote the tapes that contained the historical loading information.

5. The issue designated in subparagraph 10(c) requires, inter alia, that the Presiding Judge determine if Kay violated the operating requirements in 47 C.F.R. §§ 90.313 and 90.633. These provisions allow Kay to operate exclusively on assigned channels if and only if he meets certain loading criteria. For example, with respect to Kay's 470-512 MHz

band Business Radio Service stations, this criteria is 90 mobile units per channel. 47 C.F.R. § 90.313(a)(3). In the 800 MHz band, the loading criteria applicable to Kay's conventional stations is 70 mobiles per channel. 47 C.F.R. § 90.633. Channels not loaded to capacity are supposed to be available for assignment to others in the area. 47 C.F.R. §§ 90.313(c) and 90.633(b). The Bureau will present evidence that Kay falsely reported more mobiles than were actually operating on numerous conventional stations. By doing so, Kay enjoyed exclusive use of frequencies to which he was not entitled. Kay has failed to supply historical loading information to assess whether the loading was present or not present when initially authorized. Under the Commission's rules, however, Kay was required to modify his license if the loading decreased. 47 C.F.R. § 90.135(a)(5).¹

6. Kay led the Commission to believe that he did not keep sufficient business records to assess the sufficiency of his loading. After years of requesting loading information, the Bureau learned at his deposition that he was using a quasi-trunked configuration to link many of his conventional channels. Thus his records appeared only to reflect his end users as being assigned to a particular frequency band and mountain top. Only at his deposition in December 1997, almost four years after the Bureau requested loading information from Kay, did Kay reveal that all users listed in such a fashion were in fact on one LTR trunked system at the site listed.

¹ In Amendment of Part 90 of the Commission's Rules Pertaining to End User and Mobile Licensing Information, *Report and Order*, 7 FCC Rcd 6344, 6347 n.40 (1992), the Commission interpreted this requirement as only requiring modifications whenever the number of mobiles is below the number required to obtain exclusivity.

7. With respect to the construction issue, Section 90.155 of the Commission's Rules provided generally, at all relevant times, that private land mobile stations had to be constructed within eight months after the authorization is granted, or the license would be automatically cancelled. In the case of Specialized Mobile Radio (SMR) stations, Section 90.167 of the Commission's Rules states that the license shall automatically cancel if the stations does not commence service within twelve months after the authorization is constructed. Section 90.443(b) of the Commission's Rules required Kay to keep records concerning "the dates and pertinent details of any maintenance of station equipment, and the name of the address of the service technician who did the work." Kay did not keep those records or any other sort of records indicating when stations were constructed or placed in service. Furthermore, certain of Kay's stations are located on lands under the jurisdiction of the United States Forest Service. The Forest Service requires that any entity seeking to operate a radio station on Forest Service property obtain a permit from the Forest Service before commencing such operation. The permits produced by Kay in discovery do not cover all of the stations licensed to him which operate on Forest service land. Moreover, the loading records Kay produced in discovery indicated that certain stations had no mobiles operating on those stations. Where the available information indicates that there were no mobiles operating on the stations and that for stations located on Forest Service property, Kay did not have a permit, the available evidence shows either that the station was not constructed or that operation of the stations was permanently discontinued.

8. With respect to the issue of whether Kay abused the Commission's processes by filing applications in multiple names in order to avoid the Commission's channel sharing and recovery rules, the Bureau believes the evidence will show that Kay convinced and/or coerced Carla Pfeifer, Roy Jensen, Kevin Hessman and Vincent Cordaro to sign applications where Kay was in fact the real party in interest. The Bureau also intends to present evidence that similar arrangement existed between Kay and Marc Sobel, as well as between Kay and Jerry Gales.

9. With respect to the malicious interference issue, Section 333 of the Communications Act, 47 U.S.C. § 333 prohibits willful and malicious interference with radio communications. The Bureau will present two instances in which Kay deliberately interfered with the radio communications of his competitors. In one instance, an employee of Kay saw Kay use equipment to deliberately interfere with the radio communications of a competitor. In another instance, employees of the Commission's Compliance and Information Bureau observed Kay making certain transmissions which appeared to be made for the basis of interfering with the radio communications of others.

10. Finally, with respect to the issues added by Memorandum Opinion and Order, FCC 98M-15 (released February 2, 1998), the record will show that Judge Frysiak has concluded that Kay held de facto control over stations licensed to Marc Sobel (Sobel). In this proceeding, Kay made the following representations in an attempt to convince the Presiding Judge to remove stations licensed to Sobel from the scope of this hearing:

James A. Kay, Jr. is a different individual. Marc Sobel is a different individual. Kay does not do business in the name of Marc Sobel or use Sobel's name in any way. As shown by the affidavit of Marc Sobel attached as Exhibit II hereto, Kay has no interest in any of the licenses or stations held by Marc Sobel. Marc Sobel has no interest in any of the licenses or stations authorized to Kay or any business entity in which Kay holds an interest. Because Kay has no interest in any license or station in common with Marc Sobel and because Sobel was not named a party to the instant proceeding, the Commission should either change the OSC to delete the reference to the stations identified as stations 154 through 164 in Appendix A, or should dismiss the OSC with respect to those stations.

Notwithstanding those representations, Kay controlled the 800 MHz stations licensed to Sobel through a "management agreement" which gave Kay virtually absolute control over those stations. Kay prepared the applications for the stations, provided the equipment needed to construct those stations, obtained and serviced the customers, paid all of the expenses relating to those stations (including Sobel's legal fees), negotiated the sale and purchase of stations licensed to Sobel, had the revenues from those stations deposited into Sobel's bank account, and had his employees work on virtually every aspect of Sobel's stations. While Sobel performed technical work on these stations, he did so as a contractor selected and paid by Kay. Furthermore, Kay had an option to purchase these stations for the nominal sum of \$500 each (Kay was offered \$1.5 million for approximately fifteen of these stations), and Kay had agreed to purchase these stations upon Sobel's death. Under his own understanding of the word "interest," Kay knew that he had an interest in Sobel's stations, and his claim to the contrary was therefore a knowing misrepresentation. Furthermore, Kay lacked candor by failing to candidly disclose his relationship with Sobel when he filed his motion.

II. SUMMARY OF TESTIMONY

11. James A. Kay, Jr.: Mr. Kay will testify in Washington and will be an adverse witness. Mr. Kay will be asked to testify concerning each of the issues designated in this proceeding. He will be asked to testify concerning the 308(b) letters he received from the Commission; the circumstances surrounding his refusal to provide the information requested in those letters; his ability to provide the information requested by the Commission; his record keeping practices; his representations to the Commission concerning his record keeping practices; his practices regarding loading of customers on stations; his representations and certifications to the Commission concerning loading; his reported loading on stations; inspections of his stations by the Commission; the presence or absence of Forest Service permits relating to his stations; an inspection of his station conducted by Ben Nakamiyo and Paul Oei at which Kay was observed interfering with communications of another licensee; incident(s) where Roy Jensen observed Mr. Kay deliberately interfering with the communications of other radio operators; Mr. Kay's involvement in filing applications and/or operating stations applied for or licensed in the name of Carla Pfeifer, Kevin Hessman, Vincent Cordaro, Roy Jensen, and Jerry Gales; his relationship with Marc Sobel; his involvement in applying for, constructing, managing, and operating the 800 MHz stations licensed to Marc Sobel; the representations Kay made to the Commission and to the Presiding Judge concerning his relationship with Mr. Sobel; Kay's involvement in managing stations licensed to others; and all other matters calculated to lead to the discovery of admissible evidence under the designated issues. The Bureau estimates that Kay's direct testimony will

require approximately 3-4 full days, although that figure could be shortened considerably if the parties reach certain stipulations.

12. Barbara Ashauer: Ms. Ashauer is an employee of Mr. Kay and will be called as an adverse witness. Ms. Ashauer will be asked to testify concerning the nature of records present in Mr. Kay's office, the nature of Kay's computer systems and her ability to obtain information from those systems, and the interpretation and meaning of Kay's business records. Estimated direct testimony time - 2 hours.

13. Craig Sobel: Mr. Craig Sobel is a consultant responsible for writing programs for and maintaining Kay's computer systems. He will be called as an adverse witness. He will testify concerning his experience and maintaining and writing computer software, his work with respect to Kay's computer systems, Kay's ability to obtain loading information from his computer, and his review of the computer files produced by Vincent Cordaro in this proceeding. Estimated direct testimony time - 3 hours.

14. Paul Oei: Mr. Oei is an engineer with the Commission's Compliance and Information Bureau. He will be asked to testify concerning his inspection of Kay's station and records, as well as an inspection at which Kay was observed interfering with radio communications. Estimated direct testimony time - 2 hours.

15. Carla Pfeifer: Ms. Pfeifer is a former acquaintance of Mr. Kay who had an SMR application filed in her name. She will be asked to testify concerning the circumstances surrounding the filing of that application, Kay's involvement in the filing of that application and construction and operation of that station, and the agreements between Ms. Pfeifer and Mr. Kay. Estimated direct testimony time - 1.5 hours.

16. Roy Jensen: Mr. Jensen was formerly a General Manager employed by Kay. He will be asked to testify concerning applications for radio licenses filed in his name, Kay's involvement in filing those applications, the nature and availability of Kay's business records during his employment, the configuration of Kay's radio systems, his observation of Kay deliberately interfering with the radio communications of others, and his knowledge of Kay's loading practices. Estimated direct testimony time - 3 hours.

17. Kevin Hessman: Mr. Hessman formerly worked in the shipping department for Mr. Kay, and two applications for licenses were filed with the FCC in his name. Mr. Hessman will be asked to testify concerning his knowledge concerning those applications and licenses, as well as Kay's involvement with respect to those applications and licenses. Estimated direct testimony time - 1 hour.

18. Vincent Cordaro: Mr. Cordaro was formerly a Service Manager, then General Manager employed by Kay. He will be asked to testify concerning applications for radio licenses filed in his name, Kay's involvement in filing those applications, the nature and

availability of Kay's business records during his employment, his observation of Kay deliberately interfering with the radio communications of others, the configuration of Kay's radio systems, his knowledge of certain equipment present in Kay's business, his knowledge of Kay's loading practices, and information in his possession concerning Kay's customers and loading. Estimated direct testimony time - 5 hours.

19. Marc Sobel: Mr. Marc Sobel is a Commission licensee and businessman who has repaired equipment for Kay. He will be called as an adverse witness. Mr. Sobel will be asked concerning his role in constructing Kay's stations, and their respective roles in applying for, constructing, and operating the stations subject to the Management Agreement between Sobel and Kay. He will also be examined on the circumstances behind the preparation and filing by Kay of statements to the Commission concerning any relationship between himself and Kay, and the nature and extent of relationships between Sobel and Kay.

III. DESCRIPTION OF IMPORTANT CATEGORIES OF DOCUMENTS

20. With respect to the 308(b) issue (Exhibits 1-17), the Bureau's exhibits consist of an exchange of correspondence between the Commission and Kay during the pre-designation investigation of Kay, as well as certain documents in which Kay makes representations concerning his records.

21. With respect to the loading issue (Exhibits 18-288), Exhibit 18 is a chart summarizing the Bureau's analysis of the loading issue. Most of the remaining documents are

organized by call sign in the following manner. The first exhibit for each call sign is an excerpt from the Commission's data base for the call sign in question, which shows the authorized loading for that call sign, as well as identifying information for the station in question. The second exhibit for a call sign, if available, is a copy of the radio station license for the call sign in question. The third exhibit for a call sign, if available, is the most recent application filed by Kay, which shows his representations concerning loading. The fourth exhibit for a given call sign is that portion of Kay's response to the Bureau's interrogatories showing the loading on that call sign. The final exhibit for a given call sign are the available customer print screens for those customers which the loading records show to be customers on that station. Kay did not provide any evidence of loading on certain call signs, so for those stations, no loading records or customer records have been produced.

22. With respect to the construction issue, proposed WTB Exhibit 19 is the complete compilation of Kay's loading records. The Bureau will use evidence that Kay does not have loading on particular call signs as evidence under this issue. Similarly, proposed WTB Exhibit 289 is the compilation of all available Forest Service permits that Kay produced to the Bureau in discovery. Proposed WTB Exhibit 290 contains information as to when authorizations were granted and Kay's representations as to when stations were constructed. Finally, proposed WTB Exhibit 291 shows the results of an inspection of Kay's stations by a Commission employee, which shows that certain sites authorized under licenses were not constructed.

23. The Bureau's presentation under the willful and malicious interference issue does not rely on documents.

24. With respect to Issue (d), the documents in question (Exhibits 294-326) are various documents relating to the relationship between Kay and the individuals in question, as well as other documents showing Kay's involvement with respect to the applications or licenses in question.

25. With respect to the issues added by the Presiding Judge, proposed WTB Exhibit 327 is Judge Frysiak's decision in the Sobel proceeding concluding that Kay controlled the 800 MHz stations licensed to Sobel. Proposed WTB Exhibits 328 and 329 are the transcript of Sobel's and Kay's testimony at the Sobel hearing. Proposed WTB Exhibit 330 reflects the corrections to that transcript made by the parties to that proceeding. Proposed WTB Exhibits 342 and 343 contain the representations Kay made in this proceeding concerning his relationship with Sobel. Proposed WTB Exhibits 331-341 detail the relationship between Kay and Sobel, as well as Kay's involvement with respect to those stations. Also, proposed WTB Exhibit 11 is relevant to this issue, for on June 2, 1994, Kay represented that he did not operate any station licensed to himself, Buddy Corp., or Oat Trunking Group, Inc.

IV. TECHNICAL DOCUMENTS

26. The Bureau does not have any proposed exhibits which it would consider to be "technical documents." The Bureau's expert witness, W. Thomas Gerrard, is available to

explain how land mobile stations operate and to answer any technical questions the Presiding Judge might have.

V. SANCTIONS SOUGHT BY BUREAU

27. The Bureau will not make a final determination concerning sanctions until it files proposed findings and conclusions in this proceeding. Based upon information available to the Bureau, however, the Bureau anticipates arguing that all of Kay's licenses should be revoked. With respect to a forfeiture, the Bureau has not established a firm position at this time.

VI. STIPULATIONS

28. The Bureau and Kay have not reached any stipulations at this time. The Bureau is willing to discuss stipulations with Kay.

VII. GLOSSARY OF TECHNICAL TERMS

29. The Bureau anticipates that the following technical terms will be used during this case:

Base Station: A station at a specified site authorized to communicate with mobile stations.

Channel loading (or loading): The number of mobile transmitters authorized to operate on a particular channel within the same service area.

Control Point: Any place from which a transmitter's functions may be controlled.

Control Station: An Operational Fixed Station, the transmissions of which are used to control automatically the emissions or operation of another radio station at a specified location.

Conventional Radio Station: A method of operation in which one or more radio frequency channels are assigned to mobile and base stations but are not employed as a trunked group.

Frequency Coordination: The process of obtaining the recommendation of a frequency coordinator for a frequency(ies) that will most effectively meet the applicant's needs while minimizing interference to licensees already operating within a given frequency band.

Frequency Coordinator: An entity or organization that has been certified by the Commission to recommend frequencies for use by licensees in the Private Land Mobile Radio Services.

Land Mobile Radio System: A regularly interacting group of base, mobile, and associated control and fixed relay stations intended to provide land mobile radio communications service over a single area of operation.

Mobile Station: A station in the mobile service or intended to be used while in motion or during halts at unspecified points. This includes hand carried transmitters.

Private Carrier: An entity licensed in the private services and authorized to provide communications service to other private services on a commercial basis.

Repeater: A station that simultaneously retransmits the transmission of another station on a different channel or channels.

Secondary Operation: Radio communications which may not cause interference to operations authorized on a primary basis and which are not protected from interference from those primary operations.

Specialized Mobile Radio (SMR) system: A radio system in which licensees provide land mobile communications services (other than radiolocation services) in the 800 MHz and 900 MHz bands on a commercial basis to entities eligible to be licensed under this part, Federal Government entities, and individuals.

Trunk: A one or two-way channel provided as a common traffic artery.

Trunk Group: All of the trunks of a given type of characteristic that extend between two switching points.

Trunked Radio System: A method of operation in which a number of radio frequency channel pairs are assigned to mobile and base stations in the system for use as a trunk group.

VIII. STATEMENTS OF LEGAL POINTS AND AUTHORITIES

30. The following is a list of authorities upon which the Bureau intends to rely upon in this proceeding. While the Bureau has made a good faith attempt to list important legal authority, this list is not exhaustive, and the Bureau does not intend this list to limit its right to rely upon other legal authority:

A. 308(b) Issue

Carol Music, Inc., 37 FCC 379, 383-84 (1964) (duty of licensee to respond to Commission request for information)

Faith Center, Inc., 82 FCC 2d 1 (1980), aff'd, Faith Center, Inc. v. FCC, 679 F. 2d 261 (D.C. Cir. 1982), cert. denied, 459 U.S. 1203 (1983) (duty to comply with discovery orders of the Presiding Judge)

Warren L. Percival, 8 FCC 2d 333, 334 (1967) (duty of licensee to respond to Commission request for information)

B. Construction and Operation Issue

Amendment of Part 90 of the Commission's Rules Pertaining to End User and Mobile Licensing Information, Report and Order, PR Dkt 92-78, 7 FCC Rcd 6344 (1992) (mobile loading information required from Private Land Mobile licensees).

Amendment of Part 90 of the Commission's Rules to Eliminate Separate Licensing of End Users of Specialized Mobile Radio Systems, Report and Order, PR Dkt 92-79, 7 FCC Rcd 5558 (1992) (mobile loading calculated from business records and that licensees of conventional stations are required to report all changes in loading to allow for shared use).

Letter from Ralph, Haller, Chief, Private Radio Bureau, to David Weisman, Esq., Meyer, Faller, Weisman and Rosenberg, P.C., 8 FCC Rcd 143 (December 23, 1992) (states

that mobile units may only be counted once toward loading on an SMR system).

P & R Temmer v FCC, 743 F.2d 918 (D.C. Cir. 1984) (An FCC licensee takes its license subject to the conditions imposed on its use. These conditions may be contained in both the Commission's regulations and in the license. Acceptance of a license constitutes accession to all such conditions. A licensee may not accept only the benefits of the license while rejecting the corresponding obligations).

C. Abuse of Process Issue

Intermountain Microwave, 24 FCC 983 (1963) (standards for de facto control)

D. Malicious Interference Issue

47 U.S.C. § 333

E. Sobel Transfer of Control and Misrepresentation Issues

Marc Sobel, 12 FCC Rcd 22879 (ALJ 1997) (Initial decision in Sobel proceeding)

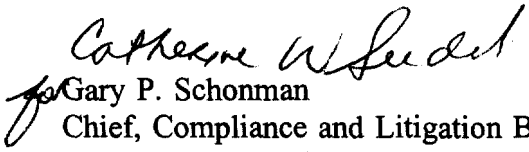
Fox River Broadcasting, Inc., 93 FCC 2d 127, 129 (1983) (definition of misrepresentation and lack of candor)


IX. SUMMARY OF EXPERT WITNESS TESTIMONY

31. Mr. Gerrard will testify concerning the basics of operation of land mobile stations, customary record keeping in that industry, the reporting of loading to the Commission, and the technical configuration of land mobile stations, as well as any other matter on which the Presiding Judge desires his expertise, including the explanation of technical terms. Mr. Gerrard will conclude that, in certain respects, Kay's failure to keep certain types of records deviated from industry custom and practice.

32. The Bureau will not stipulate at this time to the qualifications of John Bryant and James P. Hanno to be qualified expert witnesses.

Respectfully submitted,
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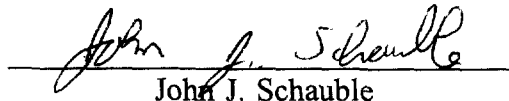
CERTIFICATE OF SERVICE

I, John J. Schauble, an attorney in the Enforcement and Consumer Information Division, Wireless Telecommunications Bureau, certify that I have, on this 29th day of July, 1998, sent by hand delivery, copies of the foregoing "Wireless Telecommunications Bureau's Trial Brief" to:

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